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Supreme Court, U.S.
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No. 96-

In The

# Supreme Court of the United States

October Term, 1995

JAMES A. RAGLAND, an individual; AMERICAN TIMBER PRODUCTS, INC., d/b/a RED RIVER LUMBER COMPANY, an Oklahoma corporation; and BAYLESS E. KIRTLEY, an individual,

*Petitioners,*

v.

SMS FINANCIAL, L.L.C., an Arizona limited liability company,

*Respondent.*

**Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma**

## PETITION FOR WRIT OF CERTIORARI

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Dated: August 16, 1996

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## QUESTIONS PRESENTED

1. Whether under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, 103 Stat. 183, an assignee of the Federal Deposit Insurance Corporation ("FDIC") is covered under the provisions of 12 U.S.C. § 1821(d)(14)(A) and (B) as to the six-year statute of limitations.

2. Whether the opinion in *SMS Financial, L.L.C. v. Ragland*, 918 P.2d 400 (Okl.App. 1995) conflicts with the Supreme Court's Opinion in *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. ___, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994).

3. Whether the provisions of 12 U.S.C. § 1821(d)(14)(A) and (B) governing the statute of limitations confer a right on the FDIC which can be transferred to an assignee of the FDIC.

## PARTIES TO THE PROCEEDING

Petitioner, James A. Ragland, is a resident of Oklahoma City, Oklahoma. Petitioner, American Timber Products, Inc., d/b/a Red River Lumber Company, is a corporation existing by virtue of the laws of the State of Oklahoma. Petitioner, Bayless E. Kirtley, is a resident of Oklahoma City, Oklahoma.

Respondent, SMS Financial, L.L.C., is a limited liability company existing by virtue of the laws of the State of Arizona.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners, James A. Ragland, American Timber Products, Inc., d/b/a Red River Lumber Company, and Bayless E. Kirtley, respectfully request that a Writ of Certiorari issue to review the Judgment and Opinion of the Court of Appeals of the State of Oklahoma entered in the above captioned case on December 26, 1995, and the Petition for Certiorari to the Court of Appeals of the State of Oklahoma which was denied on May 22, 1996.

## OPINIONS BELOW

The Opinion of the Court of Appeals of the State of Oklahoma dated December 26, 1995, is reported at 918 P.2d 400 and is reproduced at Pages A-1 through A-8 of the Appendix to this Petition ("Pet.App."). Petitioners filed a Petition for Rehearing in the Court of Appeals of the State of Oklahoma which was denied on February 13, 1996, and is reproduced at Pet.App. B-1. Petitioners filed a Petition for Certiorari to the Court of Appeals of the State of Oklahoma which was denied on May 22, 1996, and is reproduced at Pet.App. C-1.

## STATEMENT OF JURISDICTION

Petitioners seek review of the Judgment and Opinion of the Court of Appeals of the State of Oklahoma on December 26, 1995, and the Petition for Certiorari to the Court of Appeals of the State of Oklahoma which was

denied on May 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## PERTINENT STATUTORY PROVISIONS

The following provision of FIRREA, 12 U.S.C. § 1821(d)(14)(A) and (B):

> **(d) Powers and duties of Corporation as conservator or receiver.**
>
> * * *
>
> (14) Statute of limitations for actions brought by conservator or receiver.
>
> (A) In general. Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be –
>
> (i) in the case of any contract claim, the longer of –
>
> (I) the 6-year period beginning on the date the claim accrues; or
>
> (II) the period applicable under State law; . . .
>
> (B) Determination of the date on which a claim accrues. For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of –
>
> (i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

The following State of Oklahoma statutory provision, 12 O.S. 1991 § 95:

**§ 95. Limitation of other actions**

Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

First. Within five (5) years: An action upon any contract, agreement or promise in writing. . . .

## STATEMENT OF THE CASE

On February 7, 1994, SMS Financial, L.L.C., an Arizona limited liability company ("SMS"), filed a Petition to foreclose a mortgage issued by American Timber Products, Inc., d/b/a Red River Lumber Company ("Red River") to secure a promissory note issued by James A. Ragland ("Ragland"). The note and mortgage were issued to Union Bank & Trust Company ("Union"). Union failed and was taken over by the FDIC on March 31, 1988. The note and mortgage were transferred to the FDIC on March 31, 1988, which in turn sold and assigned the note and mortgage to SMS on October 1, 1993.

Bayless E. Kirtley ("Kirtley") received title to the real property by quit claim deed from Red River on December 30, 1992. Kirtley filed a counterclaim against SMS stating that the maturity date of the notes given by Ragland to Union matured May 1, 1988. Kirtley claimed that the

applicable statute of limitations in the State of Oklahoma is five years pursuant to 12 O.S. 1991 § 95 (First). Kirtley claimed that because SMS filed suit on February 7, 1994, that SMS's petition was untimely and barred by the applicable statute of limitations.

SMS moved for summary judgment against all defendants. Petitioners responded by claiming the proper statute of limitations was five years under Oklahoma law, but argued in the alternative that while 12 U.S.C. § 1821(d)(14) may allow the FDIC to invoke a six-year statute of limitations, by its very terms, § 1821 pertains exclusively to the FDIC, not an assignee of the FDIC, such as SMS. On August 25, 1995, the District Court of Canadian County, State of Oklahoma, granted SMS summary judgment against all defendants. The Court ordered the mortgage foreclosed and the property sold at auction.

Petitioners filed an appeal to the Supreme Court of the State of Oklahoma. The case was assigned to the Court of Appeals of the State of Oklahoma, Division Four. On December 26, 1995, the Court of Appeals of the State of Oklahoma, Division Four, affirmed the District Court's judgment against petitioners. Petitioners filed a Petition for Rehearing to the Court of Appeals of the State of Oklahoma, Division Four, which was denied on February 9, 1996. Petitioners then filed a Petition for Certiorari to the Court of Appeals of the State of Oklahoma, Division Four, which was denied on May 22, 1996.

Petitioners now seek the review of this Court.

## REASON FOR GRANTING THE WRIT

**THE STATUTORY PROVISIONS OF FIRREA (12 U.S.C. § 1821(d)(14)(A) AND (B)) SHOULD BE REVIEWED AND CERTIORARI GRANTED TO CLARIFY WHETHER AN ASSIGNEE OF THE FDIC IS COVERED UNDER THE PROVISIONS OF THE SIX-YEAR STATUTE OF LIMITATIONS AND WHETHER THE OPINION OF THE COURT OF APPEALS OF THE STATE OF OKLAHOMA CONFLICTS WITH *O'MELVENY & MYERS v. F.D.I.C.*, 114 S.Ct. 2048 (1994).**

It is respectfully contended that the Court of Appeals of the State of Oklahoma has decided a federal question relating to FIRREA in a way that conflicts with the applicable decision of this Court in *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. ___, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994). This case presents an important question of whether the provisions of FIRREA apply only to the FDIC or Resolution Trust Corporation ("RTC") in their status as a conservator or receiver. 12 U.S.C. § 1821(d). Under the rule of *inclusio unius, exclusio alterius*, FIRREA should not be applied to assignees of the FDIC or RTC.

In *O'Melveny & Myers v. F.D.I.C.*, 114 S.Ct. at 2048, the FDIC argued that the provisions of 12 U.S.C. § 1821(d)(2)(A)(i) should be read as non-exclusive grant of rights to the FDIC receiver which can be supplemented or modified by federal common-law, and that FIRREA as a whole by demonstrating the high federal interest in this area, confirms the Court's authority to promulgate such

common-law. This Court in rejecting the argument of the FDIC stated at 114 S.Ct. at 2054:

> . . . This argument is demolished by those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver. See 12 U.S.C. § 1821(d)(14) (1988 ed., Supp. IV) (extending statute of limitations beyond period that might exist under state law); . . . *Inclusio unius, exclusio alterius*. It is hard to avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it.

The Oklahoma Court of Appeals in the above captioned case is seeking to create an additional "common-law" exception to FIRREA. In *SMS Financial L.L.C. v. Ragland*, 918 P.2d at 400, the Court in its opinion relied upon *Mountain States Financial Resources Corporation v. Agrawal*, 777 F.Supp. 1550 (W.D.Okl. 1991). In the *Agrawal* case, the Court determined that an assignee of the FDIC was entitled to the six-year statute of limitations provided in 12 U.S.C. § 1821(d)(14)(A). The Court in the *Agrawal* case stated at page 1552:

> . . . An assignee stands in the shoes of the assignor, and acquires all of the assignor's right and liabilities in the assignment. This general principle and a strong public policy require that the FDIC's assignee acquire the six-year limitations period provided by § 1821(d)(14)(A). *See*

*D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942); . . .

In *Federal Debt Management, Inc. v. Weatherly*, 842 S.W.2d 774 (Tex.App.-Dallas 1992), the Court determined that the language of 12 U.S.C. § 1821(d)(14) is clear and unambiguous and that the six-year statute of limitations applies only to actions brought by the FDIC as conservator or receiver. The assignees of the FDIC are not covered by the express terms of the statute. The Court in the *Weatherly* case rejected the decision in *Mountain States Financial Resources Corporation v. Agrawal*, 777 F.Supp. at 1550 and stated that the statute of limitations governing a particular cause of action is not a "right" inherited by an assignee. 842 S.W.2d at 778.

The Court in *WAMCO III, Ltd. v. First Piedmont Mortg.*, 856 F.Supp. 1076 (E.D.Va. 1994) determined that an action by an assignee of the RTC was governed by the five-year state statute of limitations and not the six-year statute of limitations under FIRREA (12 U.S.C. § 1821(d)(14)(A) and (B)) because the six-year statute of limitations applies only to actions brought by the RTC in its status as receiver. The Court in rejecting the decisions in *Mountain States Financial Resources Corporation v. Agrawal*, 777 F.Supp. at 1550 and *F.D.I.C. v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993) and their progeny stated on page 1086:

> Congress, in plain and simple language made the six-year statute of limitations in FIRREA applicable only to actions brought by RTC in its status as receiver. It is difficult to envision a remedy or benefit that is more personal in nature. For these reasons, it appears that the

common-law maximum which lies at the heart of WAMCO's authority does not operate to confer the benefit of the six-year statute of limitations on the assignee of the RTC.

The decisions by the Courts in *Mountain States Financial Resources Corporation v. Agrawal*, 777 F.Supp. at 1550 and *F.D.I.C. v. Bledsoe*, 989 F.2d at 805 were decided prior to this Court's decision in *O'Melveny & Myers v. F.D.I.C.*, 114 S.Ct. at 2048. The six-year statute of limitations provided for in FIRREA applies only to actions brought by the FDIC or RTC in their capacity as a conservator or receiver.

## CONCLUSION

The decision of the Court of Appeals of the State of Oklahoma in the above captioned case conflicts with the provisions of FIRREA and the decision of this Court in *O'Melveny & Myers v. F.D.I.C.*, 114 S.Ct. at 2048. This case presents an important question which should be clarified by this Court as to whether the provisions of FIRREA should be applied only to the FDIC or RTC as a conservator or receiver and not to assignees of the FDIC or RTC. For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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## APPENDIX

A. Opinion of the Court of Appeals of the State of Oklahoma, Division Four filed December 26, 1995 ..... A-1

B. Order of the Court of Appeals of the State of Oklahoma, Division Four denying Appellant's Petition for Rehearing filed February 13, 1996 ..... B-1

C. Order of the Supreme Court of the State of Oklahoma denying the Petition for Writ of Certiorari to the Court of Appeals of the State of Oklahoma, Division Four filed May 22, 1996 ..... C-1

## APPENDIX A

RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF APPEALS

IN THE COURT OF APPEALS
OF THE STATE OF OKLAHOMA

DIVISION FOUR

| | |
|---|---|
| SMS FINANCIAL L.L.C., an Arizona limited liability company,<br><br>Appellee,<br><br>vs.<br><br>JAMES A. RAGLAND, an individual; AMERICAN TIMBER PRODUCTS, INC. d/b/a RED RIVER LUMBER COMPANY, an Oklahoma corporation; and BAYLESS E. KIRTLEY, an individual,<br><br>Appellants. | No. 86,256<br><br>FOR PUBLICATION<br><br>(Filed Dec. 26, 1995) |

APPEAL FROM THE DISTRICT COURT OF
CANADIAN COUNTY, OKLAHOMA

Honorable Edward C. Cunningham, Trial Judge

SMS Financial filed petition to foreclose a note and mortgage issued by defendants. The note and mortgage were issued to Union Bank and Trust. Union Bank failed, and the note and mortgage were transferred to the FDIC which in turn sold and assigned the note and mortgage to SMS Financial. Defendants raise defense of statute of limitations. We hold 12 U.S.C.A. § 1821(d)(14)(A) and (B), which allows FDIC, a federal receiver, six years from date of appointment as receiver in which to file a petition to

foreclose on a mortgage applies to its assignees as well, and thus SMS's petition is timely.

AFFIRMED

James Vogt
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Vogt & Morgan
Oklahoma City, Oklahoma — For Appellee

Jack R. Durland, Jr.
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Oklahoma City, Oklahoma — For Appellants

OPINION

GOODMAN, P.J.

This appeal was assigned to the accelerated docket pursuant to Civil Appellate Procedure Rule 1.203 (A)(1)(a), 12 O.S. Supp. 1994, ch. 15, app. 2. The defendants appeal the order of the trial court which: 1) overruled defendant Ragland's motion for new trial, and, 2) granted summary judgment to the plaintiff.

The standard of review of a summary judgment granted pursuant to District Court Rule 13, 12 O.S. Supp. 1994, ch. 2, app., is whether the facts, inferences, and conclusions, viewed in the light most favorable to the party opposing the motion, are such that reasonable men, in the exercise of fair and impartial judgment, might reach differing conclusions from those facts. If so, the motion must be denied. *White v. Wynn*, 708 P.2d 1126 (Okla. 1985). The standard of review of a trial court's order overruling a motion for new trial is whether the

court abused its discretion. *Smith v. Pierce*, 843 P.2d 391 (Okla. Ct. App. 1992); *Gearhart Industries v. Grayfox Operating*, 829 P.2d 1005 (Okla. Ct. App. 1992).

II Facts

On February 7, 1994, SMS Financial, (SMS) filed a petition to foreclose a mortgage issued by American Timber Products, Inc., d/b/a Red River Lumber Company (Red River)[1] to secure a promissory note issued by James Ragland (Ragland). The note and mortgage were issued to Union Bank and Trust. Union Bank failed, and the note and mortgage were transferred to the FDIC on March 31, 1988, which in turn sold and assigned the note and mortgage to SMS Financial on October 1, 1993.

Defendant Bayless Kirtley's answer states he received title to the property by a quit claim deed from Red River on December 30, 1992. Kirtley's answer contained a counterclaim, stating that the maturity date of the notes[2] given by Ragland to Union Bank matured May 1, 1988.

---

[1] Ragland is the president of Red River. There is no evidence in the record submitted of what consideration Ragland gave Red River in exchange for Red River mortgaging its real property as security for Ragland's note. Because Red River failed to file an answer or other responsive pleading, the issue of failure of consideration is not before us.

[2] Ragland's first note was due May 1, 1987. This note was secured by the mortgage set out above. It appears this note was paid by a cash payment and new promissory note due May 1, 1988. The record fails to show whether the original mortgage was intended to secure the second note as well. Again, this issue is not before us on appeal.

Accordingly, Kirtley claims the applicable statute of limitations is five years, pursuant to 12 O.S.1991 § 95 (First). Because SMS filed suit on February 7, 1994, Kirtley claims SMS's petition was untimely.

Defendant Ragland filed a motion to quash the service obtained on him. He presented affidavits that he was never personally served, as stated in the return of service. Ragland later filed an answer to SMS's petition, raising the defenses of insufficient service of process and the statute of limitations.

American Timber Products, Inc, d/b/a Red River Lumber Company, failed to file any answer or other responsive pleading.

On June 10, 1994, SMS moved for summary judgment against Kirtley on his counterclaim. Kirtley responded by claiming the proper statute of limitations was five years under Oklahoma law, but argued in the alternative that while 12 U.S.C.A. § 1821 may allow the FDIC to invoke a six-year statute of limitations, by its very terms, § 1821 pertains exclusively to the FDIC, not an assignee of the FDIC, such as SMS. This motion was overruled by the trial court on August 26, 1994, to allow the parties to conduct further discovery.

In an unrecorded hearing on December 9, 1994, the trial court conducted an evidentiary hearing on Ragland's motion to quash, and subsequently overruled it. Ragland sought a new trial January 27, 1995.

On May 4, 1995, SMS moved for summary judgment against all defendants.

On August 25, 1995, a judgment was filed overruling Ragland's motion for new trial, and granting SMS's summary judgment against all defendants. The court noted American Timber Inc, d/b/a Red River Lumber Company was in default, and granted summary judgment against it. The court entered a money judgment against Ragland in favor of SMS, and determined the interest of SMS in the mortgaged real estate was superior to that of Kirtley. The court ordered the mortgage foreclosed and the property sold at auction.

## III Issues

The issues raised in the defendants' motion for new trial and preserved on appeal concern the applicable statute of limitations and the validity of service obtained upon Ragland.

### A. The statute of limitations issue

We first address the statute of limitations issue to determine if SMS's petition is timely. SMS is the assignee of the FDIC, the receiver of Union Bank's rights and interests in the real property. Therefore, we first look to the applicable statute of limitations pertaining to receivers.

The applicable statute is 12 U.S.C.A. § 1821 (d)(14)(A) and (B).

> (14) Statute of limitations for actions brought by conservator or receiver.

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any *action brought by the Corporation* as conservator or receiver shall be –

(i) in the case of any *contract claim, the longer of* –

(I) *the 6-year period beginning on the date the claim accrues;* or

(II) the period applicable under State law.

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the *date on which the statue of limitation begins to run on any claim describe in such subparagraph shall be the later of* –

*(i) the date of the appointment of the Corporation as conservator or receiver;* or

(ii) the date on which the cause of action accrues.

The defendants claim that the six-year statute of limitations applies only to the original receiver, *i.e.* the FDIC, but not to an assignee of the FDIC, such as SMS. Because this statute does not apply, the defendants argue the court must use the five-year statute of limitations available under state law, which began to run when the note was due. The defendants cite *Federal Debt Management, Inc. v. Weatherly,* 842 S.W.2d 774 (Tex. Ct. App. 1992), in support of this proposition.

SMS, on the other hand, citing *Mountain States Financial Resources Corporation v. Agrawal*, 777 F.Supp. 1550 (W.D. Okla. 1991), argues that the six-year statute does apply to assignees of the receiver.

Our review of the case law which has dealt with this issue indicates that *Mountain States* is in accord with the majority of the reported decisions on this issue. *Weatherly*, on the other hand, stands almost alone in its holding that only the FDIC can use the six-year limit.

We agree with and adopt the reasoned analysis of this issue as set out in *Cadle Co. II, Inc. v. Lewis*, 864 P.2d 718 (Kan. 1993), which determined that since the assignee stood in the shoes of the assignor, and thus obtained the same rights as the assignor, the six-year statute of limitations was therefore applicable to actions by the assignee receiver.

Thus we hold that, SMS, as assignee of the rights of the assignor FDIC, is entitled to rely on the six-year statute of limitations set out above regarding actions brought by federal receivers. The petition filed by SMS against the appellants was therefore timely because it was filed within six years of the date the FDIC became the receiver of Union Bank's assets.

B. Service of Process

The defendants argue the service obtained on Ragland was defective, and thus any order of judgment against him is void on its face. The defendants submitted various affidavits from persons who claim no personal service of process was served on Ragland on the date

specified on the return of service. There was evidence that a process server approached defendant Ragland in the parking lot of his business with the summons. However, Ragland drove off before being handed the summons, and the process server allegedly threw the papers on the trunk of Ragland's car as he drove away. The signature of a process server on a return of service constitutes a prima facia, but rebuttable, presumption of proper service. The party opposing the service must overcome that presumption of proper service by presentation of evidence. *See, generally,* 12 O.S. 1991, § 2004.

It appears from the record that the trial court had before it the affidavits of the various witnesses, conducted an evidentiary hearing, and determined that Ragland failed to overcome the presumption of lawful service. Though we have no record of the hearing, we have reviewed the evidence before the trial court on this issue. After deferring to the trial court's assessment of the witnesses, their testimony, and the other evidence introduced, we cannot say the order of the trial court was against the weight of that evidence. We find no error, and therefore affirm the trial court's decision on this issue.

In summary, we hold the defendants were properly served with a summons and a petition that was itself filed in a timely manner, and affirm the order of the trial court.

AFFIRMED.

RAPP, V.C.J., and STUBBLEFIELD, J., concur.

December 26, 1995

***APPENDIX B***

IN THE COURT OF APPEALS, DIVISION 4

STATE OF OKLAHOMA

(Filed Feb. 13, 1996)

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER(S):

86,256 SMS FINANCIAL, L.L.C., an Arizona limited liability company, Appellee, v. JAMES A RAGLAND, et al., Appellants.

Appellants' Petition for Rehearing is denied.

Done in conference this 9th day of February, 1996.

/s/ Jerry L. Goodman
JERRY L. GOODMAN
Acting Presiding Judge
Court of Appeals, Division 4

## APPENDIX C

## IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

**(Filed May 22, 1996)**

**Wednesday, May 22, 1996**

**THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:**

86,256 SMS Financial, L.L.C., an Arizona limited liability company v. James A. Ragland, an individual et al.

**Certiorari denied.**

CONCUR: Kauger, V.C.J., Hodges, Lavender, Simms, Opala, Summers, Watt, JJ.

DISSENT: Wilson, C.J., Hargrave, J.

/s/ Alma Wilson
CHIEF JUSTICE